

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 15th day of May, two thousand eight.

PRESENT:

HON. JOSÉ A. CABRANES,
HON. ROBERT A. KATZMANN,
HON. PETER W. HALL,
Circuit Judges.

LIANG KAI GAO,
Petitioner,

v.

07-4257-ag
NAC

U.S. DEPARTMENT OF JUSTICE,
ATTORNEY GENERAL MICHAEL B. MUKASEY,¹
Respondents.

¹Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Michael B. Mukasey is automatically substituted for former Acting Attorney General Peter D. Keisler as a respondent in this case.

FOR PETITIONER: **Richard Tarzia, Belle Mead, New Jersey.**

FOR RESPONDENTS: **Jeffrey S. Bucholtz, Acting
Assistant Attorney General; Barry J.
Pettinato, Assistant Director;
Carmel A. Morgan, Trial Attorney,
Office of Immigration Litigation,
U.S. Department of Justice,
Washington, D.C.**

UPON DUE CONSIDERATION of this petition for review of a decision of the Board of Immigration Appeals ("BIA"), it is hereby ORDERED, ADJUDGED, AND DECREED, that the petition for review is DENIED.

Petitioner Liang Kai Gao, a native and citizen of the People's Republic of China, seeks review of a September 7, 2007 order of the BIA affirming the January 17, 2006 decision of Immigration Judge ("IJ") Sandy K. Hom denying petitioner's application for withholding of removal.² *In re Liang Kai Gao*, No. A95 873 470 (B.I.A. Sept. 7, 2007), *aff'g* No. A95 873 470 (Immig. Ct. N.Y. City, Jan. 17, 2006). We assume the parties' familiarity with the underlying facts and procedural history of the case.

When the BIA adopts the decision of the IJ and supplements the IJ's decision, this Court reviews the decision of the IJ as supplemented by the BIA. See *Yan Chen v. Gonzales*, 417 F.3d 268, 271 (2d Cir. 2005). We review the agency's factual findings under the substantial evidence standard, treating them as "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B); see also *Manzur v. U.S. Dep't of Homeland Sec.*, 494 F.3d 281, 289 (2d Cir. 2007). However, we will vacate and remand for new findings if the agency's reasoning or its fact-finding process was sufficiently

²Gao waived his application for relief under the Convention Against Torture ("CAT") at a merits hearing before the IJ and, as discussed below, the agency pretermitted his application for asylum.

flawed. See *Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 406 (2d Cir. 2005).

As an initial matter, we generally lack jurisdiction to review the agency's pretermission of an alien's asylum application. See 8 U.S.C. § 1158(a)(3). However, we retain jurisdiction, under 8 U.S.C. § 1252(a)(2)(D), to review constitutional claims and "questions of law." In his brief, Gao argues that the IJ violated his due process rights by refusing to reconsider the timeliness of his asylum application where the BIA had found error in the IJ's adverse credibility finding. He further argues that in declining to revisit the asylum application, the IJ misapplied the law of the case doctrine. Although these arguments state a question of law, see *Gui Yin Liu v. INS*, 508 F.3d 716, 722 (2d Cir. 2007), they are unavailing, *Khan v. Gonzales*, 495 F.3d 31, 35 (2d Cir. 2007). In remanding Gao's case to the IJ, the BIA found that any error in the IJ's credibility finding was harmless as it related to the IJ's pretermission of Gao's asylum application. Thus, the BIA remanded only for further consideration of Gao's withholding and CAT claims. Under these circumstances, the IJ properly concluded that his prior finding that Gao's asylum application was untimely remained the law of the case. See *In re S-Y-G-*, 24 I. & N. Dec. 247, 250 (BIA 2007); see also *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002). To the extent we have jurisdiction to review this aspect of Gao's petition, it is denied.

As to the agency's denial of Gao's application for withholding of removal, we find that Gao has failed to exhaust the arguments he makes before this Court. Before the agency, Gao argued that he was entitled to withholding of removal based solely on the forced sterilization of his wife - a claim which the BIA properly denied based on this Court's holding in *Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007) (en banc). However, in his brief to this Court, he argues that he is entitled to withholding of removal based on the fines that were imposed on him for having three children. As the Government has raised Gao's failure to exhaust before this Court, we decline to consider his unexhausted arguments. *Lin Zhong v. U.S. Dep't of Justice*, 480 F.3d 104, 124 (2d Cir. 2007).

For the foregoing reasons, the petition for review is DENIED. As we have completed our review, any pending motion for a stay of removal in this petition is DISMISSED as moot. Any pending request for oral argument in this petition is DENIED in accordance with Federal Rule of Appellate Procedure 34(a)(2), and Second Circuit Local Rule 34(d)(1).

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

By: _____